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No. 85-2004

In the Supreme Court
OF THE
United States

OCTOBER TERM 1985

GELTMAN INDUSTRIES, INC.,
Petitioner,
VS.
THE TRUSTEES OF THE AMALGAMATED
INSURANCE FUND,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was the limitation on employer withdrawal liability set forth in 29 U.S.C. § 1405(b) [Section 4225(b) of the Employee Retirement Income Security Act of 1974, PL 93-406 ("ERISA")] properly applied to the liability for withdrawal from the Fund incurred by Geltman Industries, Inc., when Geltman became insolvent and underwent liquidation and dissolution?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents The Trustees of the Amalgamated Insurance Fund ("Fund") respectfully submit that the Petition for Writ of Certiorari of Geltman Industries, Inc. does not raise an important question of federal law which should be settled by this Court and pray that review on writ of certiorari be denied.

REASONS FOR DENYING THE WRIT

I

Review On Writ Of Certiorari Is Not Warranted.

This case does not present special and important reasons for review. Even though Geltman raises an issue without guiding precedent as to the application of Section

1405's two limiting subsections, the Court of Appeals for the Ninth Circuit utilized approved canons of statutory construction in applying Section 1405(b) to limit Geltman's withdrawal liability. The Ninth Circuit's interpretation of Section 1405 will not have a significant impact on employers withdrawing from multiemployer pension plans. Rather, Section 1405 contains several calculation methods, dependent upon the pension plan's operations as well as the employer's actions and status, with varying and individualized impact on employers. Geltman merely seeks the calculation it regards most favorable to itself. Certiorari is not properly granted under such circumstances. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955).

II

The Plain Language Of Section 1405 Mandates Application Of Subsection (b) In This Case, As The Ninth Circuit Court Of Appeals Correctly Determined.

Section 1405(a) defines a limitation of withdrawal liability to be applied "[i]n the case of bona fide sale of all or substantially all of the employer's assets in an arm's-length transaction to an unrelated party . . ." Section 1405(b) separately prescribes a withdrawal liability limitation "[i]n the case of an insolvent employer undergoing liquidation or dissolution . . ." Section 1405(d) defines an "insolvent" employer as one whose liabilities, including withdrawal liability [determined without regard to subsection (b)], exceed its assets as of the commencement of the liquidation or dissolution [without including withdrawal liability].

In Geltman's case, the Court of Appeals for the Ninth Circuit, applying accepted principles of statutory construction and in agreement with both an arbitrator and the District Court, found that Geltman was an insolvent

employer, by statute and by its own admission, whose liquidation invoked the withdrawal liability formula of Section 1405(b).

The primary rule of statutory construction is to ascertain and give effect to the plain meaning of the language used. *American Tobacco Company v. Patterson,* 456 U.S. 63, 68 (1982). The words of a statute must be construed in context and provisions must be harmonized, internally and with each other, to the extent possible. Interpretive constructions which would render some words surplusage, meaningless, or inconsistent or which would render part of a statute inoperative are to be avoided. *Colautti v. Franklin,* 439 U.S. 379, 392, (1979); *United States v. Menasche,* 348 U.S. 528, 538-39 (1955). A specific statutory section qualifies a more general section and will govern, even where the general provision is broad enough to encompass the same subject. *Fourco Glass Company v. Transmirra Products Corporation,* 353 U.S. 222, 228-29 (1957).

The contention upon which Geltman bases its Petition for Certiorari, that the Section 1405(a) sale of assets language is broadly "available" to limit its withdrawal liability, would render subsection (b), with its express application to insolvent employers undergoing liquidation or dissolution, meaningless. Sale of any remaining assets is typically the manner in which insolvent businesses liquidate. If Geltman does not fall within the terms of Section 1405(b), then virtually no insolvent employer will. Even if, as Geltman asserts, a subsection (a) sale of assets could encompass an insolvency liquidation, Congress did not write the statute that way but specifically included subsection (b) to apply to an insolvent employer undergoing liquidation. *Russello v. United States,* 464 U.S. 16, 23 (1983); *United States v. Naftalin,* 441 U.S. 768, 773-74 (1979). As the Ninth Circuit Court of Appeals cor-

rectly concluded, subsections (a) and (b) parallel each other grammatically, and subsection (b), as the more specific, controls.

III

Application Of Section 1405(b) Is Consistent With The Legislative History, Context, And Purpose Of ERISA.

One of the principal purposes of ERISA, when enacted in 1974, was to ensure that employees and their beneficiaries not be deprived of retirement benefits by the termination of pension plans before sufficient funds accumulated to fulfill promised benefits. Although the 1974 Act imposed some contingent liability for unfunded benefits on employers withdrawing from multiemployer pension plans, ERISA did not adequately protect plans from the adverse consequences of termination or withdrawal of employers from multiemployer plans and potentially encouraged withdrawal. To alleviate the problem, the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") was enacted. MPPAA placed greater responsibility for continued maintenance of the financial integrity of a multiemployer plan on withdrawing employers. See generally *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984).

In provisions pertinent to the context of this case, MPPAA provides that an employer shall not be considered to have withdrawn from a plan solely because of a change in corporate structure, including change in corporate identity, merger, consolidation, and division, if the change causes no interruption in contributions or obligation to contribute to the plan. 29 U.S.C. § 1398. The same section provides that a suspension of contributions during a labor dispute does not constitute withdrawal. A bona fide arm's-length sale of assets to an unrelated party such that the seller ceases covered operations or ceases to

have an obligation to contribute to the plan does not result in a withdrawal if the buyer is obligated to contribute to the plan for substantially the same number of contribution base units as did the seller. 29 U.S.C. § 1384. Under certain circumstances, though, the seller remains secondarily liable for the buyer's withdrawal liability. Employers whose total withdrawal liability would not otherwise exceed $50,000 are excused altogether. 29 U.S.C. § 1389. Withdrawal liability may also be limited to the extent of transfer of liability to another plan. See 29 U.S.C. §§ 1391 and 1415.

Although as the Ninth Circuit Court of Appeals concluded, the Court need look no further than the plain statutory language to resolve this case, the context of Section 1405 supports the result below. MPPAA's provisions ensure that, where the employing entity undergoes a structural change, some entity remains responsible either to continue contributions or to provide a corresponding amount to fund future claims on the plan by participants and beneficiaries.

A. Section 1405(b) applies to all insolvency liquidations and dissolutions.

Congress expressed its intention that Section 1405(b) apply to all insolvency liquidations and dissolutions, rather than serve narrowly to distinguish between two types of Title 11 bankruptcies (reorganization and liquidation) as Geltman argues:

> "b. Insolvency: Under the bill, an insolvent employer undergoing a liquidation or dissolution is *always* liable for an amount equal to 50 percent of his normal withdrawal liability. However, the employer's exposure for the next 50 percent of his normal withdrawal liability is limited to the employer's liquidation or dissolution value . . . . To qualify for this rule,

> an insolvent employer need not undergo a formal liquidation or dissolution. It must, however, be insolvent and wind up its business affairs . . . ."
> Senate Floor Explanation, Cong. Record, p. S10117, July 29, 1980; emphasis added.

The Senate language plainly contemplates that when an insolvent employer winds up its business, whether formally or informally, under Chapter 7 or 11, or on its own as Geltman has done, the employer will always be liable for at least 50 percent of its normal withdrawal liability under Section 1405(b).

Contrary to Geltman's argument, by expressly excluding Title 11 reorganizations from Section 1405(a) coverage of asset sales, Congress did not thereby extend inferential coverage under Section 1405(a) to Chapter 7 liquidations. Instead, "it appears that Congress equated reorganizations with asset sales, rather than liquidations, and decided that that type of asset sale needed no withdrawal liability limitation." *Granada Wines, Inc.*, 748 F.2d 42, 45 (1st Cir. 1984). In context in the MPPAA, Section 1405 does not distinguish between types of bankruptcies. Section 1405 excludes employers undergoing Chapter 11 reorganization from reducing their withdrawal liability altogether and distinguishes between otherwise solvent employers who sell their assets without a successor assuming their contribution obligation [subsection (a)] and insolvent employers who liquidate or dissolve [subsection (b)], for purposes of applying the withdrawal liability limitation formulae.[1]

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[1]Section 1405(a) expressly refers to ERISA Section 4204 [29 U.S.C. § 1384], which governs an asset sale to a purchaser who assumes obligations to the plan. Section 1405(a) thus contemplates a similar sale of an ongoing business, rather than the distribution or liquidation of assets of a failing and insolvent business, the purchaser(s) of assets of which would naturally be incapable of assum-

B. Section 1405 does not give insolvent employers a choice of subsection (a).

Nothing in Section 1405 gives a withdrawing employer a choice in the amount of withdrawal liability it will pay.[2]

Although implicitly acknowledging the applicability of Section 1405(b), Geltman argues that Section 1405(a) is nonetheless available to it and that the Ninth Circuit's conclusion otherwise will have a profound impact on withdrawing employers. However, even under Section 1405(a) an employer is not automatically guaranteed the favorable sliding scale limitation based on a percentage of liquidation value Geltman seeks here. Section 1405(a) limits withdrawal liability to "the greater of" the portion of the liquidation or dissolution value of the employer determined by the sliding scale [§ 1405(a)(1)(A)] or the unfunded vested benefits attributable to employees of the employer [§ 1405(a)(1)(B)]. If a plan has calculated the actual unfunded vested benefits attributable to the employer's employees and that amount is greater than the applicable percentage of liquidation value, the sliding scale limitation is statutorily made unavailable.

Moreover, in practice, application of one or the other of Section 1405's two subsections does not consistently produce the greatest reduction of an employer's liability. The lower withdrawal liability as between the subsections (a) and (b) depends on the elements of the calculations, e.g.,

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ing the task of continuing contributions. Section 1405(a)(2) refers to a "sale *or exchange*" of assets (emphasis added), further supporting an interpretation of Section 1405(a) as intended to apply to an ongoing or solvent business.

[2]In fact, MPPAA places a burden on the withdrawing employer to establish both the applicability and extent of any claimed limitation under Section 1405; in the absence of a clear showing, a plan may assume that the limitations do not apply. House Floor Explanation (Cong. Record) p. H7899, August 26, 1980.

amounts owed other creditors, the plan's calculation of unfunded vested benefits attributable to the employees, etc., not on the character of the transaction, sale or insolvency, which necessitates the calculations.[3]

Thus, the ultimate withdrawal liability limitation calculated under Section 1405 is highly specific to the withdrawing employer and to its relationship with the multiemployer plan. Allowing the withdrawing employer to recharacterize the corporate changes which cause withdrawal liability in order to produce the lowest total liability would interject uncertainty into the entire scheme of calculations, would ultimately weaken multiemployer funds, and would subvert the purposes of MPPAA to hold withdrawing employers responsible.

C. The reduction in Section 1405(b) protects the employer's creditors, not the employer.

MPPAA legislatively intends to limit the impact of withdrawal on multiemployer plans. While MPPAA contains provisions like Section 1405 reducing withdrawal liability in certain circumstances, these provisions are

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[3]One commentator has recognized that Section 1405(b) may produce a higher liability in the case of an insolvent employer than if the employer fell under subsection (a), as happened to be the case with Geltman.

> "... While [subsection 1405(b)] limits a plan's claim vis-a-vis other creditors of an insolvent, *it may actually augment what the plan could claim if the employer were solvent.* This would be the case if the liability limitations of section [1405(a)], *e.g.*, 30 percent of liquidation value, resulted in a greater reduction than the 50 percent provided by section [1405(b)]."
>
> Schmidt, "MPPAA Withdrawal Liability: Calculation, Methodology, Statutory Limitations, and Exceptions, and Accounting Treatment," in ERISA The Multiemployer Pension Plan Amendments Act of 1980 at 48, Practising Law Institute (1984); emphasis added.

limited exceptions to MPPAA's broader remedial purpose. MPPAA does not evince a specific intent to limit the impact of withdrawal liability on smaller businesses, as Geltman urges.

For example, although Section 1405(a) may result in a proportionate break for smaller businesses in some cases, as is discussed above, its sliding scale calculation does not apply to every 1405(a) sale of assets.[4] If the plan has calculated a greater amount of unfunded benefits attributable to the employees, the plan's calculation will prevail regardless of the size of the employer's business.

Section 1405 comes into play where the employer liquidates or sells the business and no purchaser assumes contribution obligations. In enacting subsection (a), Congress apparently decided that too great an impediment to the sale of solvent businesses would be created by imposition of full withdrawal liability. However, alleviating an impediment to the sale of ongoing businesses is not a factor in insolvency liquidations. Where the employer is insolvent, there is only so much to go around to creditors, including the plan. Congress must have known that withdrawal liability would be substantial and wrote Section 1405(b) so that a single creditor, the plan, would not predominate in insolvency.[5]

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[4]Geltman urges an analogy be drawn between Section 1405(a)'s sliding scale and ERISA Section 4062 [29 U.S.C. § 1362], which contains a set scale (30% of net worth) in certain cases applicable to single employer plan terminations. There is no suggestion in the legislative history that Congress intended such a selective analogy. Moreover, the comparison to single employer provisions ignores the substantial purpose of MPPAA of protecting other employers remaining in a multiemployer plan from the impact on them of withdrawal.

[5]The insolvency limitation also functions preventively to alleviate concern about the impact of potential withdrawal liability on an

Section 1405(b) establishes a minimum — 50% of normal withdrawal liability — for which the employer is liable, without respect to its size, to protect the plan and in recognition that insolvent employers have other creditors knocking on the door. If, however, the insolvent employer's other creditors have been paid, as was the case with Geltman, Section 1405(b) protects the plan up to the full liquidation or dissolution value. At that point, the plan cannot and should not be expected to reduce its withdrawal liability even further from the limitations of Section 1405(b) (and unlike any other creditors) to enable the insolvent employer or its shareholders to carry a return away from the liquidation at the expense of its employees' pensions and of employers remaining in the plan. If the insolvent employer's other creditors have been paid and if the amount of withdrawal liability owed to the plan, after the limitations of Section 1405(b) are applied, is equal to or greater than the employer's liquidation or dissolution value, then Section 1405(b) gives the plan the entire amount up to the liquidation value to cover employees' pension benefits, as was awarded by the arbitrator and upheld by the District Court and Court of Appeals in this case. The employer has already received its accommodation in the form of a statutory limitation of its liability.

CONCLUSION

Respondents submit that the Ninth Circuit Court of Appeals correctly construed Section 1405, based on the plain meaning of the statutory language. The Court

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employer's ability to secure credit. Berger, "Exceptions and Limitations Applicable to the Imposition of Withdrawal Liability under the Multiemployer Pension Plan Amendments Act of 1980," in Multiemployer Pension Plan Amendments Act of 1980: Opportunities and Hazards at 203, Harcourt Brace (1980). However, even this commentator states that the entire liability under Section 1405(b) comes "ahead of those with an equity interest in the insolvent employer." *Id.*

reached a result consistent with the legislative history and purpose of ERISA. Respondents respectfully pray that review on writ of certiorari be denied.

Dated: July 1, 1986.

Respectfully submitted,

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By: ELLEN GREENSTONE

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On July 1, 1986, I served the within Respondents' Brief in opposition in re: "Celtman Industries Inc. -v- The Trustees of the Amalgamated Insurance Fund" in the United States Supreme Court, October Term 1985, No. 85-2004;

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on July 1, 1986, at Los Angeles, California

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